

**BEFORE THE SECRETARY OF STATE
STATE OF COLORADO**

CASE NO. OS 2005-0014

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY DAVID HARWOOD REGARDING
ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY PARENTS
ALLIANCE FOR CHOICE IN EDUCATION**

This matter arises from a complaint filed with the Colorado Secretary of State on May 27, 2005, by Complainant David Harwood. The Secretary of State referred the complaint to the Division of Administrative Hearings (now known as the Office of Administrative Courts) on May 31, 2005, as required by Colo. Const., Art. XXVIII, Sec. 9(2)(a). The complaint alleges that the Respondent violated certain provisions of the Colo. Const., Art. XXVIII, Sec. 6(1). Hearing was held on July 19, 2005, before Administrative Law Judge Nancy Connick. Complainant was represented by Mark G. Grueskin, Isaacson Rosenbaum, P.C. Respondent was represented by Scott E. Gessler, Hackstaff Gessler LLC. The parties submitted closing arguments on July 22, 2005, at which time this matter was ready for the issuance of this Agency Decision.

The complaint originally named Parents Alliance for Reform in Education as an additional Respondent. At hearing, however, based on additional information supplied by Parents Alliance for Choice in Education (PACE) and its counsel, Complainant determined that only one entity relevant to this issue, PACE, exists. Complainant therefore amended its complaint, with Respondents' consent, to delete Parents Alliance for Reform in Education as a Respondent and to change the dollar amount of alleged unreported electioneering communications expenditures in paragraph 11 from \$5,746 to \$6,596.55. The ALJ permitted this amendment.

At the close of Complainant's case, PACE moved to dismiss. The ALJ reserved ruling on the motion at that time and now rules on it in the context of this Agency Decision. Unless otherwise stated, all dates referred to in this Agency Decision are in 2004.

ISSUES PRESENTED

Complainant contends that PACE made a late filing regarding electioneering communications spending related to a mass mailing and follow-up telephone calls. Complainant asserts that PACE's December 13, 2004 filing was eleven days late and that PACE should be assessed a penalty of \$50/day for each amount expended that it failed to report. The primary issues raised are whether there were electioneering

communications undertaken, when the reporting requirement was triggered, and what penalty is appropriate if a violation occurred.

FINDINGS OF FACT

1. PACE is a Section 501(c)(4) organization with tax-exempt status. Its purpose is to provide public education and to conduct policy research with an emphasis on schools of choice.

2. In the 2004 election cycle in Colorado, PACE became involved in a project in House District 23 to urge the incumbent Representative Ramey Johnson, a candidate for reelection to the Colorado House of Representatives, to support school choice legislation. Bob Schaffer, a PACE board member and volunteer, was responsible for this project at PACE ("the petition project").

3. In mid-October, 2004, Schaffer contacted Mike Rothfeld, President of Saber Communications, a consulting firm, to discuss the petition project. Schaffer indicated that PACE wanted to hire Saber Communications, and Schaffer and Rothfeld discussed and agreed upon a strategy. This strategy involved sending letters to voters urging them to sign a petition that PACE would then forward to Representative Johnson. Follow-up telephone calls would also be made to these voters. The intended recipients would be registered voters of House District 23. Rothfeld agreed to draft prototype letters for Schaffer's review. At this point, Rothfeld did not indicate what he would charge for Saber's services.

4. A few days later, Rothfeld gave Schaffer a prototype for the PACE letter and petition. Both of these refer unambiguously refer to Representative Ramey Johnson. Rothfeld also gave Schaffer ballpark figures for the costs of the entire petition project but did not have specific amounts. Schaffer understood that the total cost would be less than \$10,000. By at least this point, PACE and Saber had an agreement that Saber would provide consulting services to PACE for the petition project for a total cost estimated to be less than \$10,000. Rothfeld told Schaffer that Schaffer would be getting further communications about the unfolding of the petition project from Saber employee Matt Hoell, who would be involved in the project.

5. On October 20, at Saber's request, Schaffer prepaid postage of \$616.55 for the mailing of the letters as part of the petition project.

6. On October 22, 2004, Hoell e-mailed Schaffer regarding PACE expenditures for the letter portion of the petition project. This e-mail reflected total expenditures of \$5,786.65, including the following: \$2,500 Saber (not billed yet); \$1,036.65 for postage (\$616.55 has already been paid) and \$2,250 for printing costs. It concluded by stating, "That should be everything, Mike [Rothfeld] said we probably won't bill you for a while."

7. After this e-mail, Schaffer had no further conversations with anyone at Saber about any fees or costs associated with the petition project.

8. On October 28, Rothfeld sent Schaffer an e-mail about the cost for the telephone portion of the petition project. Rothfeld stated that there were 3,008 unique telephones in Representative Ramey's district and that the price would be \$850, inclusive of Saber's fees. Rothfeld told Schaffer that he really needed to know that day if PACE wanted to proceed and that he would provide a draft script as soon as possible. Schaffer authorized Saber to proceed with the telephone portion of the petition project.

9. Saber provided a draft script to Schaffer, which he approved. The draft script unambiguously refers to Representative Johnson. Both the letter and the telephone script state that Representative Johnson will be most receptive to the recipient's input before Election Day. By their content, both communications were intended to be distributed before Election Day.

10. Based on the following facts, the ALJ finds that at least some petition project letters were sent and at least some telephone calls were made. Schaffer directed that the letters be sent and telephone calls be made. Schaffer believed this had occurred and had no reason to think otherwise. Representative Johnson reacted to the letter, strongly suggesting that it had been sent. There was a general reaction to the content of the letter, again strongly suggesting that it was actually received by voters. The consultant hired to effectuate the mailing and telephone calls issued an invoice for services rendered. Schaffer filed a Report of Electioneering Communication, evidencing a firm belief that the letters were sent and the telephone calls were made.¹ Further, this occurred within 60 days of the general election, which occurred on November 2, 2004.

11. The next communication of any sort from Saber to Schaffer about costs or fees was the invoice Schaffer received from Saber. Although this invoice was dated November 3, 2004, Schaffer did not receive it on behalf of PACE until approximately December 6 or 7. This invoice was for \$3,770 [\$2,500 for Saber's creative fee for the letter, \$850 for the telephone (creative fee and calling), and \$420 drop ship]. Attached to the Saber invoice was an invoice from Saber's subcontractor Consolidated Mailing, dated October 21, for \$2,210 in printing costs. This printing cost was \$40 less than that contained in Hoell's e-mail of October 22. Otherwise, the invoices received on December 6 or 7 reflect costs and fees in the October 22 and 28 e-mails to Schaffer from Rothfeld and Hoell. The invoices reflect that 3,300 letters were prepared for the petition project.

12. Schaffer had no other communications with anyone at Saber about the expenses of the petition project.

¹ The record does not contain evidence that any individual registered voter in House District 23 received the letter or a telephone calls as part of the petition project.

13. On December 8, Schaffer consulted the filing deadline calendar maintained on the Secretary of State's website. On the same date, he telephoned Sherry Wofford, an official official with the Elections Division of the Secretary of State, to ask when PACE needed to make its reports. The record does not reflect what information Schaffer provided Wofford, but Schaffer understood that he did not have to file a report until January 15, 2005, because he did not pay the petition project bills or raise money until after November 30.

14. PACE paid the Saber and the Consolidated Mailing invoices on December 13, 2004.

15. On December 13, 2004, Schaffer filed a Report of Electioneering Communication on behalf of PACE with the Secretary of State. PACE reported the \$3,770 paid to Saber Communications on December 13 and the \$2,826.55 (\$2,210 plus the previous \$616.55 for postage) paid on the same date to Consolidated Mailing for the petition project.

DISCUSSION

1. Electioneering Communications Reporting Requirement. Complainant charges that PACE failed to file its required electioneering communication report by December 2, 2004, but instead filed it eleven days late on December 13, 2004. Colo. Const., Art. XXVIII, Sec. 6(a), requires persons expending at least \$1,000 on electioneering communications to file reports with the Secretary of State:

(1) Any person who expends one thousand dollars or more per calendar year on electioneering communications shall submit reports to the secretary of state in accordance with the schedule currently set forth in 1-45-108 (2), C.R.S., or any successor section. Such reports shall include spending on such electioneering communications, and the name, and address, of any person that contributes more than two hundred and fifty dollars per year to such person described in this section for an electioneering communication. In the case where the person is a natural person, such reports shall also include the occupation and employer of such natural person. The last such report shall be filed thirty days after the applicable election.

Here, Complainant questions only the timeliness, not the content, of PACE's report, filed December 13. PACE, however, has raised several issues regarding the applicability of this constitutional provision. PACE raised these arguments by means of a motion to dismiss. To the extent necessary, the ALJ now addresses and rules on these issues.

2. Existence of Electioneering Communication. PACE asserts that Complainant has failed to prove by a preponderance of the evidence that electioneering

communications occurred. The Colorado Constitution defines "electioneering communications" in Art. XXVIII, Sec. 2, as follows:

(7) (a) "Electioneering communication" means any communication broadcasted by television or radio, printed in a newspaper or on a billboard, directly mailed or delivered by hand to personal residences or otherwise distributed that:

(I) Unambiguously refers to any candidate; and

(II) Is broadcasted, printed, mailed, delivered, or distributed within thirty days before a primary election or sixty days before a general election; and

(III) Is broadcasted to, printed in a newspaper distributed to, mailed to, delivered by hand to, or otherwise distributed to an audience that includes members of the electorate for such public office.

The primary question raised by PACE as to whether an electioneering communication exists appears to be whether Complainant has proven that the petition project letters were actually sent or the telephone calls were actually made. Based on the facts outlined in Finding of Fact #10, the ALJ found that the record establishes by a preponderance of the evidence that at least some letters were mailed and some telephone calls were made. Communications were therefore mailed or otherwise distributed.

In addition, the prototype letter and telephone script unambiguously refer to Representative Johnson, a candidate for House District 23, as required by subsection (I). The record also establishes that these communications were sent in the 60 days before the general election, as required by subsection (II). Schaffer did not initiate his contacts about the petition project until mid-October, so the communications were clearly not distributed before the 60-day period. The communications were also sent before Election Day, as reasonably inferred by the October 21 and November 3 dates of the Consolidated Mailing and Saber invoices and the content of the letter and telephone message, which sought to influence Representative Johnson before Election Day. In addition, the intended recipients of both communications were registered voters in House District 23, as required by subsection (III) [the audience includes members of the electorate for the public office]. The letter and telephone calls were therefore electioneering communications.

3. Deadline for Reporting Electioneering Communications. As cited above, any person who expends \$1,000 in electioneering communications must report this spending to the Secretary of State pursuant to the schedule established by Section 1-45-108(2), C.R.S. Subsection (E) of that statutory provision provides that the report must be filed 30 days after the major election in election years. Since the election was held November 2, 2004, this means that the report for electioneering communications spending was due December 2, 2004. In order for PACE to have been required to

report its expenditures for the petition project letter and telephone calls on the electioneering communications report due December 2, 2004, however, it must have expended at least \$1,000 by sometime before that date.

The timing of PACE's duty to report is at the heart of the legal dispute between the parties. Complainant contends that in determining when PACE "expended" the \$1,000 for electioneering communications, the ALJ should be guided by the definition of "expenditure."

"Expenditure" means any purchase, payment, distribution, loan, advance, deposit, or gift of money by any person for the purpose of expressly advocating the election or defeat of a candidate or supporting or opposing a ballot issue or ballot question. *An expenditure is made when the actual spending occurs or when there is a contractual agreement requiring such spending and the amount is determined.*

Colo. Const., Sec. 2(8)(a). (Emphasis added.)

Complainant contends that PACE exceeded the \$1,000 threshold by at least October 28, triggering a December 2 reporting deadline. PACE actually spent \$616.55 for postage for the letters on October 20. Complainant then contends that there was a contractual agreement requiring the spending for the letters and telephone calls by at least October 28. There appears to be no dispute in this regard. Complainant further asserts that the e-mails of October 22 and October 28 determined the amount of spending pursuant to the parties' contractual agreement. Complainant therefore contends that PACE was required to report its electioneering communications expenditures by December 2.

While PACE disputes that spending was determined by October 28, its primary contention is that the reporting requirement is not triggered until a person actually expends or spends money on electioneering communications. PACE contends that the definition of expenditure simply does not apply. In this case, PACE only spent money for the petition project at the \$1,000 level when it paid the Saber and Consolidated Mailing invoices on December 13. It asserts that it had no obligation to report until December 13 and that its December 13 report was therefore timely.

In imposing the reporting requirements, the Colorado Constitution refers to a person who "expends" \$1,000 and to reports including "spending" on electioneering communications. Colo. Const., Sec. 6(1). Parallel statutory provisions also refer to a person who "expends" \$1,000, to a report of the "amount expended," and to a person "expending" \$1,000. Section 1-45-108(1)(a)(III), C.R.S. Neither the constitutional nor statutory language imposing a reporting requirement regarding electioneering communications uses the word "expenditure." The ALJ must first consider whether the use of "expend" constitutes an express adoption of the definition of "expenditure" in Colo. Const., Sec. 2(8)(a). The ALJ concludes that it does not.

Although “expend” is the root word for “expenditure,” the use of the verb “expend,” together with “spending,” is not itself sufficient to incorporate the definition of “expenditure.” Had the drafters of the constitutional reporting requirement intended to incorporate the definition of expenditure, they could easily have done so expressly by reference to Section 2(8)(a) or indirectly by using the term expenditure. The ALJ should not do so lightly, particularly when the constitutionally-defined term expenditure goes beyond the common meaning of this word. Words and phrases should be given their commonly understood meaning. *Estate of Moring v. Colorado Department of Health Care Policy Financing*, 24 P.3d 642 (Colo. App. 2001); *Johnson v. Colorado State Board of Agriculture*, 15 P.3d 309 (Colo. App. 2000); *Mason v. Adams*, 961 P.2d 540 (Colo. App. 1997).

The common meaning of expenditure is “the act of expending; a spending or using up of money, time, etc.; disbursement.” Likewise, the reporting requirement itself uses the verbs to expend and to spend. The verb to expend means to disburse, to pay out, to spend” The verb to spend means “to pay out (money); to disburse.”² The commonly understood meaning of both these verbs is therefore the act of actually spending money, which occurred in this case at the \$1,000 level on December 13.³

It is also noteworthy that the definition of expenditure itself contains requirements inapplicable to electioneering communications. It requires that the purpose of the payment be for expressly advocating the election or defeat of a candidate or for supporting or opposing a ballot issue or ballot question. The constitution imposes no such express advocacy requirement for electioneering communication. The existence of the express advocacy requirement in the expenditure definition further supports the position that the expenditure definition does not apply to electioneering communications spending.

Complainant contends that the Court of Appeals has recently rejected the contention, similar to PACE’s, that expenditures are limited to monies spent on express advocacy. *Williams v. Teck*, 2005 P.3d __ (03CA2456 April 7, 2005). There the Court held that the express advocacy provision of the expenditure definition did not prohibit a candidate committee from reporting as expenditures certain disbursements of campaign funds specifically authorized by statute.⁴ The alleged violation, if anything, amounted to over-reporting of payments as expenditures. The Court was persuaded by the

² Webster’s New Twentieth Century Dictionary Unabridged, 2nd Ed. 644, 644, 1744.

³ The Secretary of State has issued no rules on the issue of when the electioneering communications reporting obligation is triggered. Secretary of State rules do use the term “expenditure” in requiring entities to file electioneering reports listing all expenditures of \$1,000 or more on electioneering communications. Rule 9(2), 8 CCR 1505-6. Without more, this use of the term expenditure does not, in the ALJ’s view, incorporate the constitutional definition of this term.

⁴ The Court addressed the provision that allows a person elected to a public office to use unexpended campaign contributions for any expenses directly related to that person’s official duties as an elected official. Section 1-45-106(1)(b)(V), C.R.S.,

underlying purpose of Article XXVIII to require full disclosure of all campaign spending and the fact that the requirement for committees to itemize all expenditures of \$20 or more does not explicitly adopt the limited constitutional definition of “expenditure” in Colo. Const., Sec. 2(8)(a). Given the entirely different circumstances addressed, this opinion does little more than to suggest that the courts will look favorably on overinclusive reporting consistent with the purposes of Article XXVIII.

In this vein, however, it is important to consider whether the purpose of the electioneering communications reporting requirement is such that the drafters could only have intended that a definition such as that contained in the expenditure definition apply. Complainant argues that the definition of expenditure must be used in order to effectuate the purpose of the reporting requirement to enhance disclosures. Article XXVIII was adopted in part to provide for full and timely disclosure of funding of electioneering communications. Colo. Const., Art. XXVIII, Sec. 1. While defining an expenditure to pre-date the actual payment for electioneering communications may enhance earlier disclosures in some cases, it is not entirely clear that it would prevent disclosures long after the election. Even under such a definition, when the parties to an electioneering communication enter into a contractual agreement but do not determine the amount, no reporting requirement would arise. It is also not clear that vendors would defer payment, making a deviation from the common meaning of the term expend necessary. In sum, these are considerations best left to the drafters and voters.

The ALJ therefore finds that the requirement to report electioneering communications pursuant to Colo. Const., Sec. 6(1), is triggered when a person actually spends \$1,000. Here, that occurred when Schaffer made payments on December 13, 2004. The Report of Electioneering Communication filed the same day was therefore timely.

CONCLUSIONS OF LAW

1. Pursuant to Colo. Const., Art. XXVIII, Sec. 9(2)(a), the Administrative Law Judge has jurisdiction to conduct a hearing in this matter.

2. The issues in a hearing conducted by an Administrative Law Judge under Article XXVIII of the Colorado Constitution are limited to whether any person has violated Sections 3 through 7 or 9(1)(e) of Article XXVIII or Sections 1-45-108, 114, 115, or 117, C.R.S. Colo. Const., Art. XXVIII, Sec. 9(2)(a).

3. Colo. Const., Art. XXVIII, Sec. 9(1)(f) provides that the hearing is conducted in accordance with the Colorado Administrative Procedures Act. Under the Administrative Procedures Act, the proponent of an order has the burden of proof. Section 24-4-105(7), C.R.S. In this instance, Complainant is the proponent of an order seeking relief against Respondents for violations of the Colo. Const., Sec. 6(1). Accordingly, Complainant has the burden of proof.

4. Respondent PACE timely filed its report of spending on electioneering communications pursuant to Colo. Const., Sec. 6(1), on December 13, 2004.

AGENCY DECISION

It is the Agency Decision that the complaint in this matter is dismissed in its entirety.

DONE AND SIGNED

August 2, 2005

NANCY CONNICK
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above **AGENCY DECISION** by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

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on this ____ day of August, 2005.

Technician IV

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